

**GOVERNOR'S OFFICE OF HIGHWAY SAFETY &
ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**

Present

2017 Advanced DUI Seminar

September 20-22, 2017

Phoenix, Arizona



**TRYING A PRESCRIPTION DRUG /
MARIJUANA CASE**

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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Prescription Drug DUI Cases

APAAC Advanced DUI Seminar
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Prescription Drug Cases are more and more prevalent

- Better detection, police training
- Newer and more potent drugs
- Doctor Shopping
- Doctors are more willing to prescribe
- People are aware of dangers and enforcement of alcohol DUI's, but ignore prescription warnings

Older Drivers and Medications

2009 AAA Study - 78% of 55 and older drivers surveyed take more than one Rx med. & only 28% knew impact the drugs could have on their ability to drive.



Remember during jury selection

Some More Disturbing Facts

- ▶ Opioid prescriptions tripled over 20 years
- ▶ Prescription painkillers are more widely used than tobacco in America
- ▶ Americans consume about 80 percent of the global opioid supply and 99 percent of the supply of hydrocodone (Vicodin)
- ▶ In 2014:
 - Number of US deaths from Homicide-16,000
 - Number of US deaths from prescription painkillers-19,000

The Presentation of a DUI Prescription Drug Case Should Be No Harder than Other DUI Cases

...Then why does it seem harder?

ATTITUDE!!!



- ▶ Jurors
- ▶ Judges
- ▶ Officers
- ▶ & Prosecutors

- ▶ Issues with Judge/Jury Appeal
 - “Legal”
 - A doctor prescribed & is monitoring
 - They/someone they know take them
 - Less common knowledge
 - Its not the drug – it’s the medical condition
 - Impairment looks different
 - Technical





The Media Thinks it’s Harder

- ▶ USA Today: “DUIs involving prescription drugs difficult to prove” 10/17/2010
- ▶ New York Times: “Drivers on Prescription Drugs Are Hard to Convict” 2010

Where might they be getting that idea from???



PROSECUTOR PERCEPTIONS

We tell ourselves it's harder. If we don't change our attitude about prosecuting a prescription DUI, how can we expect to change anyone else's?

Alcohol Is a Drug!

- ▶ It is well known that impaired driving by alcohol is dangerous and illegal.
- ▶ But because of its popularity, prevalence and acceptance, alcohol is not seen as a drug.
- ▶ The reason we have DUI laws is to keep drivers impaired by any substance off the road!



Why are we more comfortable prosecuting an Alcohol DUI?

- ▶ Effects of alcohol are common knowledge
- ▶ Common behaviors associated with drinking too much
- ▶ Recognizable odor associated with alcoholic beverages



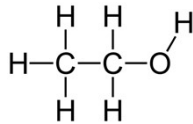
Why are we more comfortable prosecuting Illegal Drug DUI?

- › Stigma around illegal drug use
- › We are taught illegal drugs are bad
- › Films, TV depiction of illegal drugs



Ethanol vs. Prescription

- › Ethanol (drinking alcohol) is a neurotoxic psychoactive drug.
- › As a psychoactive drug, it is a chemical that binds to receptors in the brain causing changes in brain function and resulting in alterations in perception, mood, or consciousness.
- › Ethanol is a CNS Depressant.



Ethanol vs. Prescription

- › Most CNS depressants including ethanol act on the brain by increasing activity at receptors for the inhibitory neurotransmitter gamma-aminobutyric acid (GABA). They increase GABA signaling—thereby increasing inhibition of brain activity—to produce a drowsy or calming effect.



Ethanol vs. Prescription

- ▶ Other CNS Depressants:
 - **Benzodiazepines**, such as diazepam (Valium) and alprazolam (Xanax);
 - **Non-benzodiazepine sleep medications**, such as zolpidem (Ambien), eszopiclone (Lunesta), and zalepon (Sonata);
 - And **Barbiturates**, such as mephobarbital (Mebaral), phenobarbital (Luminal Sodium), and pentobarbital sodium (Nembutal)

Prescription Drug Highlight: Benzodiazepines

- ▶ Class of drugs includes Xanax (alprazolam), Klonopin (clonazepam), Valium (diazepam), and Ativan (lorazepam).
- ▶ Class of strong CNS depressants used to treat anxiety, insomnia, seizures, and alcohol withdrawal.
- ▶ Even at therapeutic levels, impairment is possible. This happens especially when someone first begins taking the drug or changes their dose.
- ▶ After THC and its metabolite Carboxy-THC, alprazolam was the most commonly confirmed drug in blood samples at the DPS Crime Lab. It beat out meth, cocaine, and heroin.

How Do We Overcome Perceptions of Prescription Drugs and DUI?

EDUCATE THE JURY

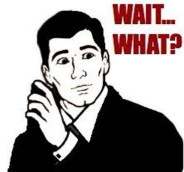
- Voir dire
- Opening Statement
- Jury instructions
- Testimony
- Closing Argument



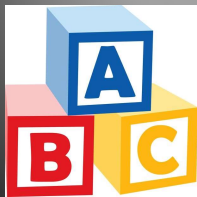
Why science teachers should not be given playground duty.

EDUCATE THE JURY

- Not your typical DUI
- Challenge the Jury-Make them think:
"Can you even get a DUI on prescription drugs?"
"Wait, my doctor TOLD me to take these prescriptions, can I still get a DUI?"



OK, Let's Start with...,
The Basics



Impairment DUI Statute 28-1381(A)(1)

It is unlawful for a person to

- drive/APC, a vehicle, within this state
- while under the influence of intoxicating liquor, **any drug**, a vapor releasing substance, or **any combination** thereof
- if impaired to the slightest degree.

“Ability to Drive” reminder:

- ▶ A jury instruction requiring proof that a defendant’s ability to drive was impaired is invalid.
- ▶ The State does not need to offer any evidence of bad driving, only that the defendant was impaired.
 - State v. Miller, 226 Ariz. 190 (Ct. App. 2011)

Per se DUI Drugs 28-1381(A)(3)

- ▶ Drive or be in actual physical control
- ▶ of a vehicle
- ▶ in this state
- ▶ while there is any drug defined in 13-3401 or its **metabolite** in the person’s body.
 - Catch All 13-3401(28)

Why important in a prescription case? Defendant has the burden!

Don’t Forget-Establish is in 13-3401

Make Differences of Charges Clear to Jury

- | | |
|---|--|
| <ul style="list-style-type: none"> ▶ (A)(1) <ul style="list-style-type: none"> ◦ Prescription not a defense ◦ Impairment to the <u>slightest</u> degree | <ul style="list-style-type: none"> ▶ (A)(3) <ul style="list-style-type: none"> ◦ No Impairment ◦ Simple Yes or No issue <ul style="list-style-type: none"> ▪ Is drug in system or not? |
|---|--|

What Do We do With a DUI Drug Case?

- ▶ Prove impairment – (A)(1) and/or...
- ▶ Prove illicit drug in system with no prescription – (A)(3)



What Not to Do

- ▶ Do not be too technical
- ▶ Don't rush – educate



METABOLITE

State v. Harris (Shilgevorkyan, RPI)

- ▶ (A)(3) only applies to metabolites that are *capable of causing impairment*.
- ▶ Mere presence of inactive metabolites such as carboxy-THC does not violate 28-1381(A)(3)
- ▶ Applies to Prescription Drugs as well

Prescriptions

▶ 28-1381(D)

- Must take prescription as prescribed
- Before amendment—using a drug prescribed by a doctor



Prescription Drug Defense 28-1381(D)

- ▶ Potential defense to (A)(3) charge
- ▶ Not a defense to (A)(1)
 - ARS 28-1381(B)
- ▶ Must be valid on DOV
- ▶ Must be U.S. doctor

Prescription Drug Defense 28-1381(D)

- ▶ **Before August 6, 2016:**
- ▶ Medical Practitioner is:
 - Podiatrist (DPM)
 - Dentist (DDS)
 - Medical Doctor (MD)
 - Osteopath (DO)
- After August 6, 2016:**
- Any Licensed Medical Practitioner – Still needs to be a US Doctor!**

Prescriptions

▶ 28-1381(D) is an affirmative defense.

- Must be alleged 20 days before trial
- Defendant's burden to raise/disclose
 - preponderance
 - file discovery request
- Not an element
- Question of fact



Case on Point

▶ *Fannin 281 P.3d 1063*

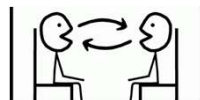
- 28-1381(D) is an affirmative defense
- Defendant's burden



Prescriptions

▶ 28-1381(D) is an affirmative defense.

- File Discovery Request
 - Prescription is hearsay
 - Who will testify for Defense?
 - Ask for a witness interview!



Prescriptions

- ▶ 28-1381(D) is an **affirmative defense**.

Why ask for a witness interview?

- See if witness will appear
- See if defendant using drugs “as prescribed”
- Doctor shopping? Alcohol use?
- Drive or operate heavy equipment?

Doctor Shopping

Remember taking 2 or more drugs at same time can be against doctor's orders.

Not uncommon for people to use multiple prescription drugs, as prescribed, from multiple doctors.

Example: Oxycodone and Xanax



Aaand..., it's a suppository

Prescription Drug DUIs

- Look for Indications Abusing the Prescription
 - Kills prescription defense
 - Assists with jury/judge appeal



Prescription Drug DUIs

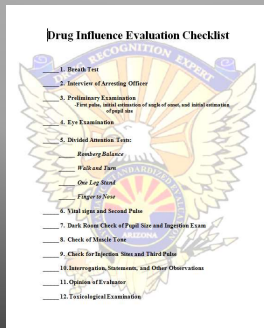
- Look for Indications Abusing the Prescription
 - Defendant's statements
 - Times took
 - How much?
 - Multiple prescriptions/Doctors.
 - Labels
 - Count pills – number left
 - Warnings
 - Pills in defendant's possession – time of day
 - Hide/deny?

How Crime Lab Can Help Prove Abusing the Drug

- Criminalist **can** tell you...
 - General effects of that drug
 - Effects of drug combinations
 - Effects on human performance
 - Documented therapeutic levels & estimated half life
- Criminalist **cannot** tell you...
 - If the person was impaired
 - Exactly when the person used the drug
 - How much the person consumed

Drug Recognition Expert (DRE)

- Developed due to need to assist officers who stop a driver, but can't ascertain what impairment they are seeing
- Revolves around 7 drug categories & symptoms associated with persons under the influence
- Protocol follows a 12-step checklist



DRE Exam

- Three determinations of a DRE**
 - Is the person impaired? If the DRE concludes that the person is impaired...
 - Is the impairment due to an injury, illness or other medical complication, or is it drug-related? If the impairment is due to *drugs*...
 - Which category or combination of categories of drugs is the most likely source of the impairment?

DRE Exam—Standardized and Systematic

- The DRE protocol is a standardized and systematic method of examining a Driving Under the Influence of Drugs. The process is *systematic* because it is based on a complete set of observable signs and symptoms that are known to be reliable indicators of drug impairment.
- The DRE evaluation is *standardized* because it is conducted the same way, by every drug recognition expert, for every suspect whenever possible.

Seven Drug Categories

- ▶ CNS Depressants (ETOH, Valium, Soma)
- ▶ CNS Stimulants (Meth, Cocaine, Desoxyn)
- ▶ Hallucinogens (MDMA, LSD, Peyote)
- ▶ Dissociative Anesthetics (PCP, Ketamine, DXM)
- ▶ Narcotic Analgesics (Heroin, Vicodin)
- ▶ Inhalants (Gases, Solvents)
- ▶ Cannabis (Marijuana, Hash)



DRE Matrix

DRUG CATEGORY SYMPTOMOLOGY MATRIX							
MAJOR INDICATORS	CNS DEPRESSANTS	CNS STIMULANTS	HALLUCINOGENS	DISSOCIATIVE ANESTHETICS	NARCOTIC ANALGESICS	INHALANTS	CANNABIS
HGN	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	NONE
VERTICAL GAZE NYSTAGMUS	PRESENT * HIGH DOSES	NONE	NONE	PRESENT	NONE	PRESENT * HIGH DOSES	NONE
LACK OF CONVERGENCE	PRESENT	NONE	NONE	PRESENT	NONE	PRESENT	PRESENT
PUPIL SIZE	NORMAL (1)	DILATED	DILATED	NORMAL	CONSTRICTED	NORMAL (4)	DILATED (8)
REACTION TO LIGHT	SLOW	SLOW	NORMAL (3)	NORMAL	LITTLE OR NONE VISIBLE	SLOW	NORMAL
PULSE RATE	DOWN (2)	UP	UP	UP	DOWN	UP	UP
BLOOD PRESSURE	DOWN	UP	UP	UP	DOWN	UP/DOWN (5)	UP
BODY TEMPERATURE	NORMAL	UP	UP	UP	DOWN	UP/DOWN/ NORMAL	NORMAL
MUSCLE TONE	FLACCID	RIGID	RIGID	RIGID	FLACCID	FLACCID OR NORMAL	NORMAL

Mark all inconsistent indicators and discuss with DRE and Crime Lab. Prepare!!

HGN and Lack of Convergence

- ▶ HGN = DID drugs
 - Depressants
 - Inhalants
 - Dissociative Anesthetics
 - No set number of cues
- ▶ Lack of Convergence = DIDC drugs
 - Cannabis also

Why Take Prescriptions? Even if “as prescribed”

To alleviate pain
To change attitude
To effect mood

Person is under its influence
Emphasize impairment

Utilize *Voir Dire* Questions & Jury Instructions

- ▶ Prescription Drugs
- ▶ Illegal Drugs
- ▶ Metabolites
- ▶ Impairment on (A)(3)
- ▶ Medical Marijuana
- ▶ Others??

Prescriptions

- ▶ Get a copy
 - Prescribed dosage vs. amount taken
 - Investigate validity
- ▶ Evidence defendant is abusing the drug (“as prescribed”)
- ▶ Consult with toxicologists

Prescriptions

- ▶ PDR/WebMD (your best friend)
 - Warnings
 - Side-effects
- ▶ Emphasize impairment and tox results
 - Tie together
- ▶ Additive effects (if more than one or ETOH combo)

DUI is Strict Liability

- ▶ Ignorance of drug effects **NOT** a defense
- ▶ Intent to drive **NOT** required (APC)
- ▶ Move *in limine* to preclude/object

State v. Parker, 136 Ariz. 474; (App. 1983); *State v. Zaragoza*, CR-08-0286-PR (Ariz. 2009); *Whisler v. State*, 121 Nev. 401, 116 P.3d 59 (Nev. 2005).

Voluntary Act (Ambien Defense) ARS § 13-201

- ▶ Because DUI is strict liability – may not apply
- ▶ **WORST** case – the voluntary act is taking the drug, not knowingly driving, etc.

Voluntary Act

- ▶ Even if were required – person
- ▶ Again at MOST goes to taking the drug
 - Got up, took keys, exited house, got into car, started car, backed up, drove in the street, made turns etc., etc., etc.,

Looks a lot like a voluntary act and even intent ! Defendant does not have to remember it . . .

AMBIEN – Sleep Driving Defense

- ▶ What is the “therapeutic level” for Ambien and ALL similar medications?

Asleep . . .



Sleep driving is NOT a defense in Arizona!
(motion in limine)

Mental Impairment

- ▶ As important as physical impairment
- ▶ In drug cases – juries often give this great attention
- ▶ Bad back, knees, age, coordination, shoes, etc. will not cause mental impairment

Observations

- ▶ FSTs
- ▶ Coordination
- ▶ Paranoia
- ▶ Paraphernalia & pill bottles
- ▶ Physical signs & symptoms (sweating, fidgety, itchy, etc.)
- ▶ Odor

Anticipate Defenses

- ▶ Therapeutic Dose
- ▶ Injuries or illnesses – medical treatment
- ▶ Prescriptions
- ▶ Inconsistencies between officer's observations
- ▶ Inconsistency between what was called and tox results
- ▶ Review defense disclosure
- ▶ Non-DRE issues (APC, ID, etc.)
- ▶ Minimal Impairment
- ▶ Is it timely disclosed?

Therapeutic Dose

Therapeutic Dose Does NOT mean the defendant is Not Impaired

Def: Giving the dose that may be required to produce a desired effect.

- ▶ Less than therapeutic dose = NONE
- ▶ More than therapeutic dose = **TOXIC**

Therapeutic Dose

Therapeutic Dose Does NOT Mean
the Defendant is taking the drug
"as prescribed"

It tells you nothing about

- ▶ When the person took the drug
- ▶ How much was taken
- ▶ Etc.

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Tox Results—What Do The Numbers Mean?

- ▶ For vast majority of drugs, no direct correlation of blood drug concentrations with degree of impairment currently exists.
- ▶ There is no "legal limit" in Arizona so must look at signs of impairment – bring this out

Direct Examination of a Toxicologist

- ▶ Preparation, Preparation, Preparation
- ▶ Study the expert's field
- ▶ STUDY THE DRUG(S)
- ▶ Be aware of communication issues
- ▶ Edit out jargon
- ▶ In-court demonstrations



Direct Examination of a Toxicologist

- ▶ Ensure expert has reviewed all the case evidence
- ▶ In general do not stipulate to expert's credentials
- ▶ Qualify as an expert
- ▶ Establish reliability of the evidence/method

Direct Examination of a Toxicologist

- ▶ Establish chain of custody
- ▶ Use expert to strengthen other parts of case (stop, roadside FSTs, etc.)
- ▶ Tie the drugs found to the impairment observed at all stages of the case
- ▶ Anticipate defenses/defense expert



Try to correlate driving and observations to the drug found



Direct Examination of a Toxicologist

▶ Ask good questions

- Do you have an opinion as to whether the defendant was impaired by drugs? CAREFUL
 - More likely to get symptoms, etc.
- Do you have an opinion as to what kind of drug caused the impairment?
- What is that opinion?
- Why did you come to that opinion?

TALK TO YOUR TOXICOLOGIST BEFORE TRIAL to see what they are comfortable testifying to.

Lab Report

- ▶ Who analyzed – which part (screening/confirmation, who will you call?)
- ▶ Understand what it means!!
 - PDR – warnings, side effects, recommended dosages
- ▶ Ensure both screening and confirmatory test has been completed and disclosed
- ▶ Chain of custody

Lab Report

What if the analyst is no longer available???

- ▶ Panic?
- ▶ No!



Tox Results without Toxicologist that tested

- ▶ An expert witness may testify in the form of an independent opinion when another expert who personally analyzed blood sample not available when relying on facts and data generated by the non-testifying expert. *State v. Karp* (Voris, RPI) No. 1 CA-CV 13-0599, (App. 2014)

- ▶ *State v. Pesqueira*, 235 Ariz. 470, 333 P.3d 797 (App. 2014)
- ▶ *Williams v. Illinois*, 132 Sup. Ct. 1222 (2012)

Contact criminalist – retest?

DRE Defense Expert Potential Areas of Cross

- ▶ State Labs methods are valid
- ▶ Get them to concede can have impairment at therapeutic dose
 - Argue – why give it to them/take if not going to affect
- ▶ Polydrug – additive affects
 - Not aware of any studies of the interaction of these drugs
 - FDA and drug companies do not do those kinds of studies

Concessions – drug impairs

Def. Witness – Areas For Cross

- ▶ Has witness seen defendant impaired/on drugs before?
- ▶ Is witness familiar with drugs in question?
- ▶ Witness's ability to know defendant was not abusing prescription, did not effect etc.
- ▶ Witness's knowledge of drugs in defendant's system

MUST Work Up These Cases

▶ Jury de-selection – voir dire

- Attitudes & familiarity with specific drug & drug category
- Who has chronic pain?
- Metabolites
- No tox results
- Case specific questions

◦ Two charges

- Prescription is not a defense to (A)(1)
- (A)(3) no impairment – will they follow law?
- Prescription only defense to (A)(3) if taking as prescribed
- Must take as prescribed

MUST Work Up These Cases

▶ Motions *in limine*

- Defendant's burden to prove valid prescription & as prescribed
- Facts used just for sympathy
- Passive inhalation
- All irrelevant evidence – review case & raise appropriate arguments
- Prescription is hearsay
- Consult with your criminalist

Prescription Drug DUIs

- Pin Down Why Taking – why acting as are
- Rule out medical explanations
 - mental vs. physical impairment
 - symptoms not consistent with medical condition
 - mental/medical issues will not cause HGN, etc.

Defense Angles

- Therapeutic dose
- Injury
- Medical condition
- Mental conditions
- Sleep driving
- Doctor's know better than you
- Tolerance
- Jury nullification
- Prescription

How Crime Lab Can Help – Defense Ploys

- Contamination
- Equipment/maintenance issues
- The science (lab's method) is EXCELLENT they can and will defend it
- Consult with them about symptoms of impairment
- If they report it – the drug IS THERE

Why Take Prescriptions?

Even if “as prescribed”

To alleviate pain
To change attitude
To effect mood

Person is under its influence
Emphasize impairment

Questions?

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